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Supreme Court Of The United States

October Term, 1982

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.
and
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.
and
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF SOUTHERN COMPANY SERVICES, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF OF SOUTHERN COMPANY SERVICES, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Southern Company Services, Inc. submits herewith its brief as *amicus curiae* in support of the petition for certiorari filed jointly by Southern Motor Carriers Rate Conference, Inc., North Carolina Motor Carriers Association, Inc., and the National Association of Regulatory Utility Commissioners ("Petitioners") seeking review of the decisions of the United States Court of Appeals for the Fifth

Circuit in *United States v. Southern Motor Carriers Rate Conference, Inc.*, 702 F.2d 532 (5th Cir. 1983) (Unit B *en banc*), and *United States v. Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469 (5th Cir. 1982) (Unit B). Pursuant to Rule 36 of this Court, the written consents of counsel for the parties have been obtained and are on file with this Court.

INTEREST OF AMICUS CURIAE

Southern Company Services, Inc. submits this brief in its capacity as agent for its electric utility operating company affiliates — Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company (hereinafter collectively "Southern Utilities").[1] These affiliates retail electric service in the States of Alabama, Georgia, Florida, and Mississippi, respectively. Each of the Southern Utilities is subject to the comprehensive regulation and supervision of the appropriate state public service commission. The Southern Utilities do not engage in collective ratemaking, but as electric utilities subject to state regulatory jurisdiction, are concerned with the broader implications of the decisions below for the *Noerr-Pennington* and state action doctrines. The Southern Utilities believe certiorari should be granted in this case because of the risk that the decisions below would unduly chill the ability of utility operating companies to propose rate and service arrangements to their respective state public service commissions, and would unduly restrict the ability of states to structure the means by which intrastate utility service and

[1]Southern Company Services, Inc. is a subsidiary of The Southern Company, a holding company organized pursuant to the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79-79z-6. The Southern Company owns the common stock of the Southern Utilities, and Southern Company Services, Inc. provides technical engineering expertise and other services pursuant to Section 13 of the Public Utility Holding Company Act, whenever one of the affiliates so requests.

rates are determined in accordance with the states' interest in controlling the price and service of businesses affected with a public interest.

SUMMARY OF ARGUMENT

The Southern Utilities concur with the reasons for granting the writ identified by Petitioners and wish to emphasize two especially important reasons for granting the writ. First, the Court of Appeals adopted an extremely restrictive construction of the *Noerr-Pennington* doctrine which fails to recognize the public importance of First Amendment freedoms in the context of state regulation of public service corporations and which conflicts with the construction adopted by the Court of Appeals for the Third Circuit. Second, the restrictive application of the state action doctrine adopted by the Court of Appeals unduly limits the ability of states to structure the manner in which the price and output of intrastate carrier and utility services are determined and depends on a "bright line" test which is wholly inappropriate given the importance and complexity of state regulatory interests.

ARGUMENT

A. The Court of Appeals Adopted An Extremely Restrictive Application of the Noerr-Pennington Doctrine, Which Conflicts With That of The Court of Appeals For The Third Circuit.

In *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the Court limited the scope of the prohibition of restraints of trade in Section One of the Sherman Act and reaffirmed the protections extended to the First Amendment freedoms of speech, association and petition by holding that bona fide applications

seeking government action are exempt from the Sherman Act notwithstanding their anticompetitive purposes or effects. The decisions below sharply restrict the application of the *Noerr-Pennington* doctrine by excluding actions taken in preparation for a petition for government action.

In considering whether to grant the writ, it is important that the Court realize that public service companies, in formulating and presenting rate and service proposals to regulatory bodies, are engaging in activities of more significance than the commercial speech involved. Because a public service company's service rights, obligations, exercise of public powers, and pricing are all subject to the will of the state, such activities are at the core of central First Amendment freedoms, especially the right to petition.

> The concept of a public service company may be simply stated. A private business firm, financed by private capital and managed by private individuals, engages in commercial activities subject to distinct public constraints. These constraints are normally administered by a government agency that supervises the availability and quality of the firm's services, and a number of ancillary matters, including the firm's financial practices, its relation with other public service companies and mergers and other major corporate changes.
>
> The core of the concept is that the public service company will make its services available on fair and equitable terms to all customers in the area it undertakes to serve. In exchange, the company will be permitted to charge prices high enough to cover the legitimate costs of conducting its regulated activities, including an appropriate return on its investment.

W. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States,* 79 Colum.L. Rev. 426, 426-27 (1979). Public service company regulation is inextricably intertwined with public policy decisions

of the broadest importance and the ongoing political life of the state in question. *See, e.g.*, A. Bolla, *Centennial of the Alabama Public Service Commission: An Historical Commentary on Its Rate Regulation Powers*, 11 Cumb.L.Rev. 585, 595 (1980-81) (Alabama Commission's ratemaking is "of paramount interest to the public"); *108th Report of Georgia Public Service Commission* (1980) (Georgia Commission held 479 public hearings in 1980). Accordingly, the formulation and presentation of public service company rate and service proposals are entitled to the full scope of First Amendment protection.

The Fifth Circuit recognized the propriety of according First Amendment protection to joint petitions to the public ratemaking bodies in accordance with the *Noerr-Pennington* doctrine. But the court drew a line against extending the protection:

> While the joint efforts of the bureaus to secure legislation or commission regulation permitting collective ratemaking procedures would clearly fall within the ambit of *Noerr* protection, inasmuch as it would seek to influence policy, collective action to determine the rates which the bureaus desire the commission to approve is not of the same genre.

672 F.2d at 477.

The Fifth Circuit's only stated reason for not applying *Noerr-Pennington* to the rate conferences' activities was that "[t]his case is not one to which *Noerr-Pennington* has traditionally been applied. *Noerr* and its progeny have all involved concerted attempts to obtain governmental interference with a competitor. The parties have cited no cases in which courts have invoked *Noerr-Pennington* to immunize price fixing among competitors." 672 F.2d at 477 (quoting *U.S. v. Southern Motor Carriers Rate Conference*, 467 F.Supp. 471, 484-85 (N.D. Ga. 1979)). The court thus

deemed collective rate formulation to be outside the scope of the First Amendment despite recognizing that the collective presentation of proposed rates to the regulator is protected.

This holding gives inadequate protection to Petitioners' rights of association. The narrow distinction between the formulation of an application to be placed before a government body and the application itself is inconsistent with the broad protections properly accorded the rights of petition and association. Restriction of the latter right of association "undeniably" diminishes the right of speech and petition. *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958); *accord*, *NAACP v. Claiborne Hardware Co.*, 102 S.Ct. 3409 (1982); *Citizens Against Rent Control v. City of Berkley*, 454 U.S. 290 (1981). The holding below also conflicts with the decision of the Third Circuit.

In *Horsemen's Benevolent & Protective Assn. v. Pennsylvania Horse Racing Comm'n.*, 530 F.Supp. 1098 (E.D. Pa.), *aff'd w/o opinion*, 688 F.2d 821 (3d Cir. 1982), the plaintiff alleged that the members of the Jockey Guild had violated Section One of the Sherman Act by combining together to decide upon an appropriate fee schedule for jockeys in Pennsylvania and presenting it to the state horse racing commission, which adopted the schedule exactly as proposed. The district court dismissed the complaint, and the Third Circuit affirmed.

> The *Noerr-Pennington* doctrine is applicable here. The members of the Guild, in the exercise of their First Amendment rights of association and to petition the government, may jointly submit a proposal to increase jockey fees to the Horse Racing Commission. Since the law permits them to do this, it follows that they must be permitted to confer and to agree upon the fees they wish to propose.

530 F.Supp. at 1110 (citing *United States v. Southern Motor Carriers Rate Conference, Inc.*, 467 F.Supp. 471, 485 (N.D. Ga. 1979)).[2] The conflict is ironic because the two courts rely on the same formulation of the *Noerr-Pennington* doctrine by the *Motor Carriers* district court to reach opposite conclusions with the incongruous result that greater protection is afforded to horse racing than to public service activities. The fundamental First Amendment values underlying the *Noerr-Pennington* doctrine make it vital that this Court grant the writ to resolve the Third and Fifth Circuits' disagreement over the scope of the doctrine, or at least to recognize that a broad *Noerr-Pennington* protection is appropriate where public service obligations are in issue.

B. The Restrictive Application of the State Action Doctrine Adopted By The Court of Appeals Fails to Recognize Critical State Interests in Structuring the Determination of Intrastate Carrier and Utility Rates and Services.

Virtually every state, including those in which the Southern Utilities operate, *see, Ala. Code* §§ 37-1-31 *et seq.*; 37-3-11, 19 (1975); *O.C. Ga. Ann.* §§ 46-2-20 (a) - (b), 46-3-1 *et seq.*, 46-2-25, 36-7-18 (1982); *Fla. Stat. Ann.* § 366.05 (1980

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[2] The Fifth Circuit's determination that state compulsion of private anti-competitive conduct is a threshold requirement for the application of the state action immunity doctrine also conflicts with the Third Circuit's affirmance of *HBPA*. The district court dismissed the complaint against the racing commission itself despite the lack of any contention that the jockeys' collective decision to petition for a revised fee schedule was in any sense compelled or even encouraged by the state. Indeed, the district court found the clearly articulated and affirmatively expressed state policy and adequate state supervision required by *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), in the very fee-setting order being challenged. The statute defining the powers of the racing commission made no mention of jockey fees, and an appeal of the order to the state supreme court, *Gilligan v. Pennsylvania Horse Racing Commission*, 492 Pa. 92, 422 A.2d 487 (1980), was required to establish that the commission had the authority to set fees at all.

Rev.); *Miss. Code* § 77-7-211 *et seq.* (1975), has undertaken to be the final arbiter of the intrastate rates and services of public service companies and is responsible to its citizens for the results of the regulatory process. Given the strong state interests at stake and their authority over price and output, the states should be free to structure with flexibility the means by which carrier and utility proposals are formulated and state policies are implemented, as suggested by the dissent below. The dissent's position would only require an affirmative state policy to displace competition, coupled with active state supervision of its implementation. *See* 702 F.2d at 542-49 (citing *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)). The requirement of an affirmative expression of state policy and genuine state supervision would avoid sham approvals of private action while preserving the states' ability to implement intrastate price and service regulation in accordance with state policies and local conditions.

> A particularly strong justification exists for a state-sanctioned scheme if the State in effect has substituted itself for the forces of competition, and regulates private activity by the Sherman Act. Thus, an anticompetitive scheme which the State institutes on the plausible ground that it will improve the performance of the market in fostering efficient resource allocation and low prices can scarcely be assailed.

Cantor v. Detroit Edison Company, 428 U.S. 579, 611 (1976) (Blackmun, J., concurring in judgment).

In concluding that formal state compulsion is a necessary prerequisite to state action immunity, the Fifth Circuit purported to establish a "bright line" distinction between immunized and unlawful activity under the state action doctrine. Undoubtedly, "[b]right lines are important and necessary in many areas of the law," *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 51

U.S.L.W. 4539, 4544 (U.S. May 16, 1983). Yet in the area of federal-state relations, this Court's recent jurisprudence eschews the use of formalistic bright line tests in favor of an analysis of "the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce." *Id.* at 4543 (quoting from *Illinois Gas Co. v. Public Service Co.*, 314 U.S. 498, 505 (1942)). "This modern jurisprudence . . . recognizes . . . that there is 'an infinite variety of cases, . . . in which reconciliation of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved.' *Southern Pacific Co. v. Arizona ex rel Sullivan*, 325 U.S. 761, 768-769 (1945)." *Id.*

As *Arkansas Electric Cooperative Corp. v. Arkansas Public Service* illustrates, state interests in public service company regulation are great. *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 103 S.Ct. 1713 (1983), in which the Court found it "almost inconceivable" that Congress should have intended that the states lacked the power to prohibit construction of nuclear power plants on economic grounds, demonstrates the need to give those interests paramount authority, even where Congress has enacted a comprehensive regulatory scheme. "Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the states." *Id.* at 1723-24.

Moreover, the bright line test imposed by the Fifth Circuit does not even serve the critical function of a bright line, that of establishing certainty, as it is far from clear what the Fifth Circuit would require for satisfaction of the formal compulsion requirement. *See* 702 F.2d at 536 n.6 and 540 n.15. As Justice Blackmun recognized in *Cantor*:

> To be sure, there is a certain rough justice, as well as an appearance of simplicity, in a rule based upon who actually is responsible for the scheme in question, but I fear that both the justice and the simplicity would prove illusory in the rule's actual application. Every state enactment is initiated, in its way, by its beneficiaries. It would scarcely make sense to immunize only those powerful enough to speak entirely through their governmental representatives, or, for that matter, to stifle such speech with the threat that it will destroy antitrust immunity. Moreover, the process of enactment is likely to involve such a complex interplay between those regulating and those regulated that it will be impossible to identify the true "initiator."

428 U.S. at 610-11.

Given the importance of the state interests involved and the unworkable nature of the "bright line" adopted by the Fifth Circuit, the writ should be granted.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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I hereby certify that on the _____ day of June, 1983, three copies of the above *Amicus Curiae* Brief has been served on the parties of record via United States mail, first-class, postage prepaid and properly addressed as follows:

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